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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 521.

PITTSBURGH PLATE GLASS COMPANY and
CRYSTAL CITY GLASS WORKERS UNION,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PETITIONER PITTSBURGH PLATE GLASS COMPANY ON THE MERITS.

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PITTSBURGH PLATE GLASS COMPANY and
CRYSTAL CITY GLASS WORKERS UNION,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PETITIONER PITTSBURGH PLATE GLASS COMPANY ON THE MERITS.

PROCEEDINGS AND OPINIONS BELOW.[1]

The proceeding in question began with a petition, subsequently amended, for investigation and certification of representatives, pursuant to Section 9-c of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A., Sec. 159), filed by the Federation of Flat Glass Workers of America, affiliated with the C. I. O. (sometimes referred to herein as "Federation"), asserting that the appropriate bargaining unit consists of production and maintenance

[1] The nature of the proceedings is such that a brief summary thereof is necessary to accurate reference to opinions published in this case as cited herein.

employees in the Pittsburgh Plate Glass Company's flat glass division, including plate and safety glass plants located at Creighton and Ford City, Pennsylvania, and Crystal City, Missouri, and window glass plants located at Mt. Vernon, Ohio; Clarksburg, West Virginia, and Henryetta, Oklahoma (R. 354-A, 354-B).

At the hearing thereon (October 13 and 14, 1938, R. 57 et seq.) the Crystal City Glass Workers' Union (sometimes referred to herein as "Crystal City Union") filed its motion to intervene in said proceeding, asserting that it represented approximately 1,500 of a total of 1,800 employees in the Company's plant at Crystal City. The Trial Examiner denied said motion on the ground that said Union was a party to said proceedings (R. 62).

On January 13, 1939, the Board issued its Decision and Certification of Representatives[2] (R. 42-56), designating all of the Company's flat glass division as the appropriate unit and certifying the Federation of Flat Glass Workers of America as the exclusive representative of all of the designated employees in said unit.

The Federation, on January 26, 1939, filed a charge that the Company had refused to bargain in accordance with the aforesaid certification (R. 38 A), and the Board issued a complaint on February 20, 1939 (Ex. B-1a, R. 34-38, Introduced, R. 5-6), charging that such refusal by the company was an unfair labor practice. The Crystal City union was allowed to intervene.

A hearing was had March 6, 1939, on said complaint (R. 4 et seq.), at which Board's Exhibit 3-A, the records of the proceedings in the aforesaid Certification case (R. 57-71; Introduced R. 15), Exhibit 3-B, the exhibits in the Certification case (R. 275-366; Introduced R. 15), and Exhibit 3-C, a stipulation correcting errors in Exhibit 3-A (R. 336-343; Introduced R. 15), were received in evidence. It was also stipulated that all motions, objections and ex-

[2] In re Pittsburgh Plate Glass Co., 10 N. L. R. B. 1111 (R. 43).

ceptions made and taken in the course of the hearing on the Certification case (Ex. 3-A) should be regarded as renewed for the purposes of the proceeding in the Complaint case (R. 21).

The Board issued its Decision and Order[3] (R. 430-452) on said complaint on September 19, 1939, affirming its holding that the appropriate unit for collective bargaining is the designated employees in the Company's flat glass division; that the Federation is the exclusive representative of the employees in said unit, and that the refusal of the Company to bargain with the Federation in such unit is an unfair labor practice, and ordering the Company, upon request, to bargain with the Federation as a representative of all of the employees in said unit. Honorable William M. Leiserson dissented from said Decision and Order and held that the complaint against the Company should be dismissed.

The Company filed a petition to review the Decision and Certification of January 13, 1939, in the United States Circuit Court of Appeals for the Eighth Circuit (R. 453-469), and a separate petition to review the Decision and Order of September 19, 1939 (R. 469-506), which petitions were consolidated with the petition for review, which had been filed by the Crystal City Glass Workers' Union (R. 521 and 523). The Company also filed in said consolidated cases petition for leave to adduce additional evidence (R. 536). On July 23, 1940, the Circuit Court of Appeals entered its opinion (R. 545) and decree (R. 552) denying petitioner's petitions to adduce additional evidence, holding the order of the Board valid, and granting its request for enforcement thereof.[4]

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[3] In re Pittsburgh Plate Glass Co., 15 N. L. R. B. 515 (R. 430).

[4] Pittsburgh Plate Glass Co. v. N. L. R. B., 113 F. (2d) 698 (1940).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended.[1] The statute involved is the National Labor Relations Act,[2] particularly Section 9,[3] which provides in substance (a) that representatives selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit, and (b) that the Board shall be empowered to ascertain the appropriate unit.

The final decision of the Court of Appeals was announced on July 23, 1940[4] (R. 545-552), and decree was entered on the same date (R. 552-553). Petition for rehearing was denied August 12, 1940 (R. 571). Petition for writ of certiorari was filed in this court October 23, 1940, and was granted on December 9, 1940.

STATEMENT OF THE CASE.

Pittsburgh Plate Glass Company is a corporation, with its principal office located at Pittsburgh, Pennsylvania. It has been continuously, since 1883, engaged in the manufacture, sale and distribution, among other things, of various types of flat glass. Its operations are divided into five divisions, one of which is the flat glass division. The following diagram shows the location of the plants in the flat glass division, the type and extent of production, and an approximation of the number of men employed (R. 437):

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1 March 3, 1891, c. 517, Sec. 6, 26 Stat. 826; March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Jan. 31, 1928, c. 14, Sec. 1, 45 Stat. 51; June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A., Sec. 347-a.

2 July 5, 1935, c. 372, Sec. 1, 49 Stat. 449, 29 U. S. C. A., Sec. 151 et seq.

3 July 5, 1935, c. 372, Sec. 9, 49 Stat. 453, 29 U. S. C. A., Sec. 159.

4 Pittsburgh Plate Glass Co. v. N. L. R. B., 113 Fed. (2d) 698 (8th C. C. A., 1940).

Volume of Production—1937

Plant Location	Plate	Safety	Structural Carrara	Window	Employees*	
Works No. 1 Creighton, Pa.	35,072M sq. ft.	17,416M sq. ft.[1]	None	None	1289 (plate) 947 (safety)	12/ 8/37 2/ 1/38
Works No. 4 Ford City, Pa.	22,203M sq. ft.	None	None	None	1408	9/30/37
Works No. 6 Ford City, Pa.	None	None	150M sq. ft.	None	268	9/30/37
Works No. 9 Crystal City, Mo.	34,511M sq ft.	13,240M sq. ft.[2]	None	None	1607	9/30/37
Works No. 10 Henryetta, Okla.	None	None	None	494M boxes	273	12/ 8/37
Works No. 11 Mt. Vernon, Ohio	None	None	None	893M boxes	350	12/ 8/37
Works No. 12 Clarksburg, W. Va.	None	None	None	975M boxes	353	2/ 1/38

* Dates were selected to reflect approximately normal operations.
[1] Duolite and Duplate.
[2] Herculite and Duplate.

Plate glass is made in only three plants: Works No. 1, at Creighton, Pennsylvania, Works No. 4, at Ford City, Pennsylvania, and Works No. 9, at Crystal City, Missouri. In Works Nos. 1 and 9, the tank method is used. The Company has two tanks at Crystal City. One of them is designed according to a patented plan obtained from the Pilkington Company in England. It is the only Pilkington tank which the Company has (R. 90, 98). The pot method of production, used at Ford City, is quite different (R. 122).

The Company produces two types of laminated safety glass: Duplate, made at Works Nos. 1 and 9, and Duolite, made only at Works No. 1 (R. 112, 113). Herculite, a glass specially tempered for safety, is made only at Crystal City (R. 113).

Three plants in the division produce window glass exclusively. They are Works No. 10, Henryetta, Oklahoma; Works No. 11, at Mt. Vernon, Ohio, and Works No. 12, at Clarksburg, West Virginia. The method used in producing window glass is quite different from that used in the production of plate glass (R. 98).

The Crystal City plant started in 1870 and was acquired by the Company in 1895 (R. 88). It is one of the largest

in the system. The tank method is used exclusively therein and only polished plate glass is made. No material is fabricated at Crystal City for shipment to other plants for further work and in normal operations there is no exchange of unfinished or partly unfinished materials between this and other plants (R. 88-89). There is no exchange of employees between Crystal City and other plants (R. 89, 244).

The only sand mine which the Company has is operated in connection with the Crystal City plant (R. 88).

The general management of the Company's business is conducted from its office in Pittsburgh, Pennsylvania (R. 75).

The Company's superintendent at Crystal City is in full charge of operations there. All matters of working conditions (R. 89), employment and grievances (R. 92) are handled locally by him. He decides who is to be laid off and rehired. Any changes in wage rates are determined by the local superintendent and approved at the home office (R. 112, 235). It is the only plant which has its own purchasing agent (R. 111).

The plant at Crystal City is independent of the other plants to such an extent that it could be operated independently for the manufacture of plate glass, Duplate and Herculite even if it were the only plant the Company had in production (R. 95).

The plant nearest to Crystal City which produces any of the same type of glass there produced is Ford City, Pennsylvania—675 miles away (R. 90).

There is some variation in wage rates for particular occupations in the various plants. However, the variation is rarely more than one cent per hour in the averages (R. 236).

In 1933 the Federation[1] met with the Company and was

1. Federation of Flat Glass Workers of America, affiliated with C. I. O.

given some recognition as representative of workers in the window glass plants. In 1934 the Federation obtained a majority in the Creighton and Ford City plants and, without any formal agreement, was recognized there (R. 164).

On November 13, 1934, the Company entered into a written contract with the Federation which was largely devoted to providing a method for handling grievances through local unions (Ex. P. 1, R. 275; Introduced, R. 106).

In January, 1935, a dispute arose over the Federation's demand for closed shop, check-off and 20% increase in pay. The real dispute was over the check-off and closed shop principle; the Company would not have broken with the union on the point of wages (R. 79-80). The strike was terminated by a new agreement, executed February 5, effective February 1, 1935 (Ex. P. 2, R. 282; Introduced, R. 106). It granted a 5% general wage increase and also provided for the handling of grievances through local unions. All the employees in the division were given the benefit of the increase in wages (R. 236).

On November 26, 1935, a contract was made between the Company and the Federation, providing that wages should be according to attached schedule; rate schedules were included for all of the flat glass plants except Works No. 9, at Crystal City (Ex. P. 3, R. 290; Introduced, R. 106).

The major provisions of the contracts (Exs. P. 1, 2, 3) by their terms were operative only in plants where the Federation had a local union. The local union at Crystal City was not established until long after these contracts had expired (R. 199).

The last of the series of contracts was executed January 20, 1937 (Ex. p. 4, R. 321; Introduced, R. 106). The plants covered thereby are enumerated and the Crystal City plant is not included.

The attitude of the Company with respect to these contracts was that any time a majority of the employees at

any plant desired to be represented by the Federation, they would be included (R. 81).

In the negotiations which resulted in the above agreements, there was no representative of employees at Crystal City in attendance (R. 80, 103), and none of the contracts was executed by anyone from that plant (R. 108).

Mr. Robert McVay was an employee of petitioner's plant at Henryetta, Oklahoma. He has been connected with the Federation of Flat Glass Workers since July of 1933, and in May of 1934, he was elected as a district officer (R. 191-192). It was his duty, as such officer, to organize new locals. In July of 1934 he knew that the plant at Crystal City, Missouri, had not been organized and stopped off there on an informal visit (R. 192). On that occasion he found some employees of the Company who were interested in forming a union and asked them to get a hall for a meeting, but this was not done (R. 194). Mr. McVay was next in Crystal City in January of 1935, having gone there to explain the NRA plate glass code to a public meeting (R. 195). There was no direct result from the meeting, and he returned again in 1936 and talked with the town marshal and Mr. Porter, of the Citizens' Bank (R. 198-199). The Federation has carried on continuous organizational activities at Crystal City since December, 1937 (R. 172).

The first discussion between the Federation and the Company on the subject of representation of the employees at Crystal City was in October, 1936 (R. 177). It was stated for the Company that until there was some showing of membership in that plant, the Company would not recognize the Federation for its employees (R. 169).

The first that the Vice-President in charge of the flat glass division heard of the Federation having a local at Crystal City was in April, 1938, when Mr. Fuller, President of the Federation, suggested that negotiations by the Com-

pany with the Crystal City Union[1] be discontinued, upon his assurance that he would not come around for an agreement covering Crystal City until his union had a majority there (R. 107).

At the time of the execution of the first three agreements (Exs. P, 1, 2 and 3) the Federation had probably a dozen members at Crystal City. At the time the subject was first mentioned in 1936 there were possibly seventy-five members there (R. 174).

A local of the Federation was formed at Crystal City in February, 1938, and in April of that year a charter was issued to it. A witness for the Federation testified that on September 30, 1938, there were 463 members of the local, but the witness failed to produce membership cards or records to support the testimony (R. 199-200). He said that a majority of said members were employed by the Company but that probably seventy-five or eighty of them were unemployed.

The Crystal City Union was incorporated by a pro forma decree by the Circuit Court of Jefferson County, Missouri, on March 3, 1938 (R. 247). It is a labor organization, admitting to membership employees at the Company's Crystal City plant, and claims membership of something over 1,300 of such employees.[2]

The Company had recognized the Crystal City union as the representative of a majority of its employees in Works No. 9 in the spring of 1938, but when the Board filed a complaint negotiations were broken off, pending the proceedings. By stipulation entered into between the Board and the Company on July 21, 1938, the Company agreed to and did withdraw such recognition[3] (R. 345-352).

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1 Crystal City Glass Workers Union.

2 The constitution and by-laws of the Crystal City Glass Workers' Union were offered in evidence as Intervenor's Ex. 1 (R. 248) and admitted (R. 249), but were omitted from the record by stipulation (R. 574-576).

3 In re Pittsburgh Plate Glass Co., c. 778, 8 N. L. R. B. 1210, 102 F. (2d) 1004.

Crystal City, Missouri, is about thirty miles from St. Louis, is located in an agricultural area, and has no production industry except the glass plant. Employees in the plant are largely native-born Americans—sons and grandsons of men who worked in the plant before them (R. 94). In contrast to the communities in which the other divisions are located, there is no background of outside union activities in the Crystal City community (R. 240). There has been no strike there within the memory of an employee who has worked in the plant since 1919 (R. 221).

It is admitted that the Federation does not have a majority at Crystal City (R. 209), and a petition bearing the signatures of 1,270 employees, requesting that Works No. 9 be recognized as a separate unit, was admitted in evidence (Exs. I-3. A, B and C, R. 253-254, Introduced R. 254).

On January 13, 1939, the Board issued its Decision and Certification of Representatives, designating all of the plants in the Company's flat glass division as an appropriate unit and certifying the Federation as the exclusive representative of all of the designated employees in said unit (R. 43). Thereafter, the Company met with the Federation at Cleveland on January 18, 1939, and the Federation demanded that the Crystal City plant be included. Letters were then exchanged between the Company and the Federation, the substance of which is that the Federation insisted upon the inclusion of Crystal City but ultimately agreed that the then existing contract (which does not cover Crystal City) should remain in force pending a final determination of the question of appropriate unit (Board's Exs. 5-A, 5-B, 5-C, 5-D, 5-E, 5-F, R. 271-275, Introduced, R. 18).

It is the failure of the Company to recognize the Federation as the exclusive representative within the unit designated which the Board and the Court of Appeals held was an unfair labor practice.

At the hearing on the complaint, petitioner offered to prove that 1,500 out of 1,800 employees at Crystal City belong to the Crystal City union; that the membership has never been dominated or interfered with by the Company; and that membership had increased after the stipulation of July 22, 1938, and the order of September 22, 1938, based thereon, and since the Decision and Certification of January 13, 1939. The evidence was excluded (R. 26-31). The Company's petition to the court for leave to adduce said evidence (R. 536) was denied (R. 552, 553).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding: "The Board, under the facts and circumstances disclosed by the evidence, properly might have determined that the employees at the Crystal City plant were a homogeneous group whose wishes as to representation for the purpose of collective bargaining should be respected and who constituted an appropriate unit for collective bargaining; but we think that it was not compelled to do so" (R. 548).

(a) In failing to hold that the Crystal City plant is "a unit" within the meaning of Sec. 9-a of the Act and that, absent a finding based upon evidence that such unit is not appropriate, the employees therein may not be deprived, under the Act, of the right to have representatives of their own choosing.

(2) In holding that the question of appropriate unit here is debatable and that determination thereof by the Board is not subject to judicial review and in failing to consider that the action of the Board is arbitrary in that:

(a) The conclusion of the Board as to the appropriate unit is based upon specific findings of fact as to the history of collective bargaining and Company domination of employees, neither of which is supported by evidence.

(b) The reasons assigned by the Board for ignoring the wishes of the employees in the Crystal City plant are specious and are not supported by evidence.

(c) The Board capriciously ignored and contradicted factors and standards recognized by it in other cases to be applicable to the question at issue.

(d) It appears from the record that the Board refused to consider fairly and objectively undisputed

evidence and did not afford petitioner a full and fair hearing under the Fifth Amendment to the Constitution of the United States.

(3) In holding, upon findings of fact different from those considered by the Board, that the designated unit should be enforced without according the Board an opportunity to pass upon such facts and in failing to hold that since the Board's conclusion as to appropriate unit is expressly based upon findings not supported by evidence, the cause must be remanded to the Board so that it may express a conclusion upon the factors legally available.

(4) In holding that no error was committed in excluding evidence offered by petitioner to show that the membership of the Crystal City Union, constituting a majority of the employees, was not dominated or interfered with by the Company and in denying the petition to adduce such evidence in the Court of Appeals.

(a) In failing to hold that the action of the Board in excluding the evidence offered and then making findings directly contrary thereto was arbitrary and denied petitioner a full and fair hearing, as guaranteed by the Fifth Amendment to the Constitution of the United States.

(5) In holding that the facts specified by the court were sufficient to justify designation of the unit selected.

(6) In holding that where the question of appropriate unit is debatable the Board has the power to select such unit as it concludes is desirable without limiting the power of the Board to act only upon standards established by the Act under the provisions of Sec. 1, Art. I, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The legal points involved.

July 5, 1935, c. 372, Secs. 1, 7, 9, 49 Stat. 449, 452, 453, 29 U. S. C. A., Secs. 151, 157, 159;
Morgan v. U. S., 304 U. S. 1, 14-15, 58 S. Ct. 773, 775 (on rehearing, p. 999), 82 L. Ed. 1129 (1938);
Fed. Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 144, 60 S. Ct. 437, 442, 84 L. Ed. 656 (1940);
Fed. Radio Comm'n v. Nelson Bros., 289 U. S. 266, 276, 53 Sup. Ct. 627, 632, 77 L. Ed. 1166, 89 A. L. R. 406 (1933).

II. The Labor Board's conclusion as to the appropriate unit is expressly based upon the aggregate of specific findings of fact, some of which are not supported by evidence, and upon specific factors, some of which may not, validly, be considered on the question.

Constitution of the United States, Sec. 1, Art. I;
July 5, 1935, c. 372, Sec. 10e, 49 Stat. 453, 29 U. S. C. A., Sec. 160-e;
July 5, 1935, c. 372, Secs. 9-c and 10-c, 49 Stat. 453, 29 U. S. C. A., Secs. 159-c and 160-c;
Federal Radio Commission v. Nelson Bros., 289 U. S. 266, 276, 53 Sup. Ct. 627, 632, 77 L. Ed. 1166 (1933);
Morgan v. U. S., 298 U. S. 468, 480, 56 Sup. Ct. 906, 911, 80 L. Ed. 1288 (1936);
N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 47, 57 S. Ct. 615, 629, 81 L. Ed. 893 (1937);
St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 74-75, 56 S. Ct. 720, 735-736, 80 L. Ed. 1033 (1936).

A. Findings which were not legally available, but to which the Board gave major consideration, are:

(1) That the history of collective bargaining in petitioner's plants supports the unit designated.

In re Model Blouse Co., 15 N. L. R. B. No. 19 (1939);
Chrysler Corp., 13 N. L. R. B. No. 121 (1939);
In the Matter of Briggs Mfg. Co., etc., 13 N. L. R. B. No. 123 (1939).

(2) That the employees at the Crystal City plant were dominated, coerced and controlled by petitioner and are not free to express their true preference on the unit question.

Republic Fire Insurance Co. v. Weides, 81 U. S. 375, 14 Wall. 375, 20 L. Ed. 894 (1871);
N. L. R. B. v. Pacific Greyhound Lines, Inc., 303 U. S. 272, 58 S. Ct. 577, 82 L. Ed. 838 (1938);
National Licorice Co. v. N. L. R. B., 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940).

B. Factors which do not, as a matter of law, have a proper bearing upon the unit question, but to which the Board ascribes great weight, are:

(1) The assumption by the Board that the desires of the Crystal City employees for a separate bargaining unit will undergo a radical change in the future when the effect of the termination of Crystal City Union's function as a labor organization is fully realized by them.

(2) That the employees in the Crystal City plant are inexperienced in collective bargaining and should, therefore, be included in a multi-plant unit so as to have the benefit of the services of more experienced employees at other plants.

(3) The fact that the employees at the Crystal City plant did not join with those at the other flat glass plants in the 1935 strike.

III. For the Court to assume that the Board would reach the same conclusion as to the appropriate unit, if findings and factors illegally considered are eliminated, is contrary to the principle that the judgment of the Court may not be substituted for that of the Board on a purely administrative question.

National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, 226, 60 S. Ct. 493, 503-504, 84 L. Ed. 704 (1940);
National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 342-343, 60 S. Ct. 918, 930-931, 84 L. Ed. 1226 (1940);
National Labor Relations Board v. Falk Corporation, 308 U. S. 453, 458-9, 60 S. Ct. 307, 310, 84 L. Ed. 396 (1940).

IV. The designation of the appropriate unit in this case is not supported by evidence.

29 U. S. C. A., Sec. 159.

A. The undisputed evidence is that the plant at Crystal City is a unit appropriate for purposes of collective bargaining, and the action of the Board, including that plant with five of petitioner's other plants, against the wishes of the overwhelming majority of the employees at Crystal City, violates the purposes and provisions of the Labor Act and is arbitrary.

29 U. S. C. A., Sec. 159a, b;
Allied Lab., Inc., 23 N. L. R. B. No. 14 (1940);
Globe Machine & Stamping Co., 3 N. L. R. B. 294 (1937);
Atlantic Refining Co., 1 N. L. R. B. 359 (1936);
Report of N. L. R. B. to Senate Committee on Education & Labor, April, 1939, Part II, p. 147;
Second Annual Report N. L. R. B., June 30, 1937, p. 127;
Third Annual Report N. L. R. B., p. 171.

V. The refusal of the Board to consider the wishes of the great majority of the employees at Crystal City for specious reasons is arbitrary and invalidates the order.

A. Refusal to receive evidence offered by petitioner to show the wishes of the employees and to show that they had not been dominated and coerced by petitioner, which offer of proof was preserved by a timely petition to the Court of Appeals for leave to adduce such evidence, was erroneous and invalidates the order here in question.

29 U. S. C. A., Sec. 160;
Consolidated Edison Company v. N. L. R. B., 305 U. S. 197, 226, 59 S. Ct. 206, 215, 83 L. Ed. 126 (1938).

VI. If the National Labor Relations Act contains sufficient standards to comply with Sec. 1, Art. I, of the Constitution of the United States, such standards have not been objectively applied to the facts in this case and the action of the Board has been arbitrary and discriminatory, so that petitioner has been denied due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

29 U. S. C. A., Sec. 159;
Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935);
N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893;
N. L. R. B. v. Friedman-Marks Clothing Co, 301 U. S. 58, 57 S. Ct. 645, 81 L. Ed. 893;
Ohio Foundry Company, 3 N. L. R. B. 701 (1937);
Allied Lab., Inc., 23 N. L. R. B. 14 (1940);
In re Model Blouse Co., 15 N. L. R. B. 19 (1939);
Belmont Iron Works, 9 N. L. R. B. 1202 (1938);
Chrysler Corp., 13 N. L. R. B. 121 (1939);
Briggs Mfg. Co., 13 N. L. R. B. 123 (1939).

ARGUMENT.

I.

The Legal Questions Involved.

Section 9 (a) of the National Labor Relations Act[1] provides that:

> "Representatives * * * selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit. * * *"

Section 9 (b) of the Act[1] contains the delegation of power relied on by the Labor Board, and reads:

> "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

The policies of the Act are stated in Section 1[2] and the declaration of the rights of employees is set out in Section 7[3] of the Act. They are, briefly stated, to prevent obstruction of interstate commerce by protecting the rights of employees to bargain freely, through representatives chosen by them, with their employers. Section 7 specifically grants the right to bargain "through representatives of their own choosing."

The fundamental question before the Court is: whether an order[4] of the National Labor Relations Board finding

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1 July 5, 1935, c. 372, Sec. 9, 49 Stat. 453, 29 U. S. C. A., Sec. 159.
2 July 5, 1935, c. 372, Sec. 1, 49 Stat. 449, 29 U. S. C. A., Sec. 151.
3 July 5, 1935, c. 372, Sec. 7, 49 Stat. 452, 29 U. S. C. A., Sec. 157.
4 Decision and Order, Sept. 19, 1939 (R. 430-452), 15 N. L. R. B. 515.

petitioner guilty of an unfair labor practice in failing to bargain exclusively with representatives certified[5] within a unit comprising six of respondent's flat glass plants, designated as appropriate by the Laber Board, is valid. Petitioner has bargained with the Federation as representative of the other plants in each of which it has a majority, but has not recognized the Federation as the representative of employees in the Crystal City plant, where it concededly does not have a majority.

Petitioner asks this Court to determine (1) whether the Board had authority to deprive employees in an appropriate unit of their right to bargain "through representatives of their own choosing" by forcing them into another unit, and (2) to ascertain whether, even if the order is one which, on the record, the Board had the power to make, it was arrived at by full compliance with constitutional and legal requirements and limitations which this Court has called "inexorable safeguards"[6] and without which the purported order is, in contemplation of law, no order at all.

In presenting these questions we will have in mind the "differentiation between the functions of judicial and administrative tribunals * * *"[7] and will confine ourselves within the limits of the following statement:

> "'* * * Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province

[5] Decision and Certification, Jan. 13, 1939 (R. 43-56), 10 N. L. R. B. 1111.

[6] Morgan v. U. S., 304 U. S. 1, 14-15, 58 S. Ct. 773, 775 (on rehearing p. 999), 82 L. Ed. 1129 (1938).

[7] Fed. Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 144, 60 S. Ct. 437, 442, 84 L. Ed. 656 (1940).

of the commission and govern its action, are appropriate questions for judicial decision.' "[8]

Petitioner has a definite and material interest in the questions presented. The policy of the Act is to promote industrial peace. The accomplishment of this purpose has value to the public and the employer as well as to the employee.

The plan set out in the Act for fulfilling its purpose contemplates the establishment and protection of the right of employees to bargain collectively with their employers through representatives of their own choosing. The essence of the legislative scheme is that by affording opportunity for a free expression by those interested they will, if they find themselves in the minority, peaceably adhere to the American tradition of majority rule. If, however, by error of law or arbitrary action, an artificial unit is imposed and the majority is so gerrymandered as to be denied representation, the very tradition referred to stimulates resentment and rebellion.

Petitioner believes that the action of the Board in selecting the unit designated in this case is illegal and arbitrary and that its order, if allowed to stand, would defeat rather than foster satisfactory relations with a large group of its employees.

William M. Leiserson, at the beginning of his dissenting opinion, epitomizes the basic objections to the Board's order:

"I regret that I cannot concur in this decision. It imposes on the largest single plant of the company a representative for collective bargaining whom the

[8] Quoted with approval in the Pottsville case from Fed. Radio Comm'n v. Nelson Bros., 289 U. S. 266, 276, 53 Sup. Ct. 627, 632, 77 L. Ed. 1166, 89 A. L. R. 406 (1933).

employees of that plant have not chosen, and it denies these employees any opportunity to express their own free choice as to representation. It disregards the fact that the company and the Federation are bargaining collectively in accordance with the existing contract between them in all the plants of the company where the Federation represents the employees, and it convicts the company of a refusal to bargain with the Federation as the representative of the Crystal City employees, although the fact is not disputed that the Federation has never been designated by a majority of these employees to act as their representative" (R. 448, 449).

II.

The Labor Board's Conclusion As to the Appropriate Unit Is Expressly Based Upon the Aggregate of Specific Findings of Fact, Some of Which Are Not Supported by Evidence, and Upon Specific Factors, Some of Which May Not Validly Be Considered on the Question.

Designation of the appropriate unit in this case is the end result of the administrative process, a process which, to be valid, necessarily involves the following steps: first, a full and fair hearing; secondly, ascertainment of the ultimate facts from the evidence received and formulation of findings based thereon, and, thirdly, the objective application of standards established by Congress to the findings of fact made so as to produce a rational conclusion.

The Court of Appeals, in holding that there is some evidence to support the unit selected by the Board, and that the order is, therefore, not subject to judicial review (R. 549), failed to comprehend the Court's duty to examine each step of the process. It was the Court's duty to examine, not for the purpose of ascertaining whether the Court agrees with the discretion exercised, but for the

purpose of ascertaining whether the procedure followed met the fundamental constitutional and legal prerequisites to a supportable administrative order.

The Constitution[1] requires that Congress shall, in an act granting legislative authority, provide standards for the application of the power so granted, and that the recipient administrative agency exercise the power only by an impartial application of such standards to the facts before it. It is the function of the courts to determine whether, first, the grant of power, and, secondly, the exercise thereof, accords with these restrictions.

The court can fulfill its function in this connection only when specific findings of fact are made. Since the administrative tribunal has the sole right to determine the facts from conflicting evidence,[2] it is only when it has done so that the court can ascertain to what the standards are to be applied and whether they have been so applied.

Congress recognized this functional necessity by providing in Sec. 10-c[3] of the National Labor Relations Act:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order * * * as will effectuate the policies of this Act."

The Decision and Certification (R. 43-56) and Decision and Order (R. 430-452) show affirmatively that the Board's determination of the appropriate unit in this case is based upon specific findings of fact. It will be shown that some of those findings, the ones to which the Board ascribed par-

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1 Constitution of the United States, Sec. 1, Art. I.

2 July 5, 1935, c. 372, Sec. 10e, 49 Stat. 453, 29 U. S. C. A., Sec. 160-e.

3 July 5, 1935, c. 372, Sec. 10-c, 49 Stat. 453, 29 U. S. C. A., Sec. 160-c. (Sec. 9-c, 29 U. S. C. A., Sec. 159-c, makes the provision applicable to certification cases.)

ticular weight, are not supported by evidence and are, therefore, nullities. Even, therefore, if the majority ruling is supported by some evidence and is one which the Board could make, no one but the Board can say whether it would so decide if the unsupported findings were eliminated.

This Court has consistently recognized the principles expounded above.

In Federal Radio Commission v. Nelson Bros., etc.,[4] Mr. Chief Justice Hughes said:

> "'Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. The provision that the commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the court an authority to revise the action of the commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action.'"

[4] 289 U. S. 266, 276, 53 Sup. Ct. 627, 632, 77 L. Ed. 1166 (1933).

Again, in Morgan v. U. S.,[1] in discussing the validity of an order of the Secretary of Agriculture filing stockyard rates:

> "Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. **There must be evidence adequate to support pertinent and necessary findings of fact.** Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Railway Co., supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order." (Emphasis added.)

That these principles are applicable to the National Labor Relations Board is made clear by this court's opinion in N. L. R. B. v. Jones & Laughlin Steel Corp.[2]:

> "The act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right

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1 298 U. S. 468, 480, 56 Sup. Ct. 906, 911, 80 L. Ed. 1288 (1936).

2 301 U. S. 1, 47, 57 S. Ct. 615, 629, 81 L. Ed. 893 (1937).

or statutory authority are open to examination by the court * * *."

To the same effect is St. Joseph Stockyards Co. v. U. S.,[1] which contains a very complete analysis of the legal limitations upon administrative proceedings.

A. The Board attributed such importance to the following findings of fact that they amount to the very foundation of the order in question: (1) that the history of collective bargaining shows that the Company dealt with its employees on a division-wide basis and that such a unit is feasible, and (2) that the Crystal City Glass Workers Union is Company-dominated and that the employees at Crystal City are not free to express their true preferences as to the appropriate unit. There is no evidence to support either of these findings.

1. The Purported Findings Regarding the History of Collective Bargaining Have No Support in the Evidence.

The Board's opinions (R. 43-56[2] and R. 430-452[3]) demonstrate that its finding on the subject of the history of collective bargaining in petitioner's plants was the chief, if not the controlling, factor in its determination of the question of appropriate unit.

This view is supported by the following statement from the Board's opinion in the Model Blouse Co. case,[4] where the facts are strikingly similar to those here involved:

"Although, in previous cases (citing Matter of Pittsburgh Plate Glass Co., 10 N. L. R. B. 1111, and Matter of Libbey-Owens-Ford Plate Glass Company, 10 N. L. R. B. 1470), we have held the employees of a number

1 298 U. S. 38, 74-75, 56 S. Ct. 720, 735-736, 80 L. Ed. 1033 (1936).
2 Decision and Certification, 10 N. L. R. B. 1111.
3 Decision and Order, 15 N. L. R. B. 515.
4 In re Model Blouse Co., 15 N. L. R. B. No. 19 (1939).

> of plants of one employer to constitute an appropriate unit, there is lacking, in the instant case, **the history of collective bargaining upon which such decisions have rested.**" (Emphasis added.)

No one will deny that the past conduct of the parties is an important element of the unit question. Their actions, prior to the advent of controversy, often provide a reliable guide to what their real opinions and intentions are on the subject. In addition, they tend to show whether or not a particular unit, or units, is feasible and satisfactory in actual practice. In its opinion in the Certification case the Board found:

> "On November 13, 1934, the Federation entered into a written agreement with the Company, covering all employees at all the plants of the Company, including Crystal City, who were Federation members. Not until January 20, 1937, did the Company for the first time insist that Crystal City be excluded from the agreement between it and the Federation on the ground that the Federation did not have as members a majority of the employees at this plant. The written agreement signed on that day, at the insistence of the Company, despite the Federation's objections, did not cover the Federation members at Crystal City" (R. 50).

Among the findings of fact in the subsequent complaint case it is said:

> "It is objected that the Board was in error in its finding in its January 13, 1939, Decision that the contracts between the respondent and the Federation previous to the one of January 20, 1937, included Federation members employed at the Crystal City plant. We have re-examined the record and adhere to our previous finding" (R. 439).

In the same opinion, in listing the factors upon which its determination of the appropriate unit is based, it is stated:

"* * * the fact that in actual practice contracts were signed upon a division-wide basis until the respondent refused to continue upon such a basis and insisted upon isolating the Crystal City plant, where it was interfering with and dominating a labor organization of its employees; * * *" (R. 443).

It, therefore, is important to examine the written contracts between the Company and the Federation of Flat Glass Workers[4] affiliated with the C. I. O. to determine whether or not they do, in fact, support the Board's finding.

In 1933 the Federation met with the Company and was given some recognition as representative of workers in the window glass plants. In 1934 a majority was obtained by the Federation in the Company's plants at Creighton and Ford City, and, without any formal agreement, it was recognized there (R. 164). On November 13, 1934, the Company entered into its first written contract with the Federation (Ex. P. 1, R. 275; Introduced R. 106). It is largely devoted to providing a method for handling grievances through local unions. We call particular attention to the following paragraph:

"The Federation, for the purpose of effectively representing such of the Company's employees as are included in its membership, will appoint for each plant of the Company, and the Company will recognize and deal with (1) one or more members of the Local Union of the Federation in each department of each plant, to act as Grievance Men or Sub-Grievance Men in the department for which appointed, and (2) an Industrial Relations Committee consisting in each instance of the President and Vice-President of the Local Union of the Federation and four members of the Union selected by its membership. The Company, when provided with

[4] Referred to herein as Federation.

a list of the names of such Grievance Men and Sub-Grievance Men and with a list of the officers of the Local Unions and members of the Industrial Relations Committees, will co-operate with these men in order that they may properly perform their duties" (R. 276).

An examination of the above quotation and of the entire contract will show that it could only be operative in those plants in which the Federation had a local union.

In January, 1935, the dispute which had arisen from the Federation's demand for closed shop, check-off and 20 per cent increase in pay, resulted in a strike at all of the Company's plate glass plants except the one at Crystal City. The real dispute was over the check-off and closed shop principles; the Company would not have broken with the union on the point of wages (R. 79-80). The strike was terminated by a new agreement executed February 5, 1935, effective February 1, 1935 (Ex. P. 2, R. 232; Introduced R. 106). It granted a 5 per cent general wage increase and also provided for the handling of grievances through local unions.

In its findings of fact the Board, in referring to this agreement, asserts:

> "The following contract, dated February 5, 1935, granted a 5% wage increase to employees at all 'plate and safety glass plants,' and was not limited, expressly or by implication, to plants other than Crystal City" (R. 440).

The testimony on this point was given by Mr. Clause, Vice-President of the Company, and appears at page 236 of the record:

> "Q. And the flat increase in pay that was granted to the employees in the other plants—the employees at Crystal City were granted a like amount; is that

right, the same? A. The same adjustment was made, yes.

Q. The same adjustment? A. Approximately, yes."

The last of the series of contracts upon which the Board relies for its finding was executed on November 26, 1935. (Ex. P. 3, R. 290; Introduced R. 106.) It is there provided that wages should be according to schedules attached thereto, which provide wage rates separately for each plant in the flat glass division except Works No. 9, at Crystal City, Missouri, which is omitted. Although at the time of the execution of the above three agreements the Federation claims that it had probably a dozen members at Crystal City (R. 174), it appears without dispute that the Company was not aware of this claim (R. 104, 108).

The major provisions of the above contract could be applied only to those plants in which the Federation had a local union. None was formed at Crystal City until April, 1938 (R. 199).

Mr. Robert McVay, who was the Federation's president in the district in which the Crystal City plant is situated and whose duty is was to organize new locals (R. 191-192), testified that he stopped at Crystal City for an informal visit in 1934 and found some employees who were interested in forming a union (R. 194). He returned in January, 1935, to explain the NRA glass code to a public meeting (R. 195), and began organizational activities in December, 1937 (R. 172).

The conferences which resulted in the above contracts were not attended by any of the employees at Crystal City (R. 104), and none of said contracts was executed by anyone from that plant (R. 108).

The Board calls attention (R. 440) to the testimony of Mr. Clause in which he said that the first contract covers

all of the employees who were members of the Federation, and that if they had members at Crystal City they were included (R. 79). However, Mr. Clause explained the position of the Company as follows:

> "Our attitude was this, that at any time there were a majority of the employees of any plant desiring to be represented by the Federation of Flat Glass Workers we met with them, and in the early stages it was done locally at the plant. The first conferences were held at Ford City and Creighton, and then they finally came in with McCabe to the conference and the first 1934 agreement, if you could call it an agreement, was done in that way. I don't know whether there were any window glass representatives at that conference, so that our attitude is that at any time any majority of employees at any plant that desire the Federation to represent them, we met with them and they were included, and we didn't even question whether they had a majority" (R. 81, 82).

And subsequently, in answer to a question by Mr. Holmes (counsel for the Federation):

> "Q. Well, now, as we have those contracts, of course they speak for themselves, but for the purpose of the record the various plants that are involved in these contracts are all of your plants except the Crystal City plant; is that right? A. The last one specifically states that.
>
> Q. Well, before that, nothing was stated about that, was it? A. **Nothing said on either side about it**" (R. 103).

Mr. De Shettler, an officer of the Federation, in direct response to a question as to whether members of the Federation at Crystal City were covered by the first three contracts, said:

> "I would say they were; yes. They were not excluded" (R. 174).

Although the documents recognized the Federation as representative for its members without specific limitation, they could, from their very provisions, be available only in those plants in which the Federation had a local union. Exhibit P. 3, as we have already pointed out, had attached to it designated rate schedules, but, since no schedule was attached for Crystal City, that portion of the agreement could have no effect there (R. 290; Introduced, R. 106).

The Board has passed on contracts substantially like those to which we have referred, in the Crysler Corporation case.[1] The employer had fourteen plants engaged in the manufacture of automobiles, nine of which were located in Detroit and its environs. There was an interchange of materials in process of production, and the system was closely unified.

In 1937 the International Union sought recognition as the sole bargaining agent for the Company's employees. Refusal of these demands resulted in a strike, which was settled by a contract in which the International Union was recognized as the representative of its members only. The CIO union claimed that all of the plants were one appropriate unit, but the A. F. of L. and the Company asserted that each plant was a separate, appropriate unit. The Board ruled:

> "We are of the opinion that all of the plants should not be grouped in a single bargaining unit. It cannot be said that the past history of collective bargaining in the plants has established such a pattern of bargaining. On the contrary, bargaining practice in the past has reognized the individual status of the separate plants."

Thus the Court will see that the Board itself has recog-

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1 13 N. L. R. B. No. 121 (1939).
See also: In the Matter of Briggs Mfg. Co., etc., 13 N. L. R. B. No. 123 (1939).

nized that such contracts as Exhibits P. 1, P. 2 and P. 3 do not constitute a history which supports a multi-plant unit and has recognized that it is the actual bargaining practice in the past which bears upon the question at issue. The decisions in the Chrysler and Briggs cases contain findings which are the exact opposite of those made here, upon facts which cannot be distinguished from those in this case.

The question here is whether, as a matter of fact, collective bargaining has ever been carried on in a multi-plant unit which included Crystal City. No one claims that the Federation did in fact, under said contracts or otherwise, act as the representative of any Crystal City employee. The testimony of the Federation's officers shows that no attempt was made in this direction until a demand was made on the Company in October, 1936, to permit that union to act for the Crystal City employees (R. 177). Shortly thereafter (January 20, 1937), the Company and the Federation entered into the now existing contract (Ex. P. 4, R. 321; Introduced, R. 106). In view of the then recent demand of the Federation, the Crystal City plant was expressly excluded.

The contract in force at the time of the hearings was executed January 20, 1937, and enumerates the plants covered thereby (Ex. P-4, R. 321; Introduced R. 106). The reason for naming the plants covered in that contract is made perfectly clear by the testimony. Mr. De Shettler, National Secretary-Treasurer of the Federation, testified that the records of that union indicate that the first time any request was made of the Company to include Crystal City in the agreements with the Federation was in October, 1936 (R. 177). This was, of course, shortly prior to the execution of the final contract.

Mr. Leiserson has forcefully summarized much of the

argument in this connection in his dissenting opinion as follows:

> "The history of collective bargaining between the Federation and the company as evidenced by the written contracts made prior to 1937 clearly establishes that the employees of the Crystal City plant as a body were never included in a bargaining unit for which the Federation was authorized to act as a representative.
>
> "The decision not only disregards the collective bargaining history and the contracts signed prior to 1937, but it also sets aside the current contract which was signed in 1937. This contract, by its express terms, applies to five plants only and excludes the Crystal City plant" (R. 450-451).

The lower court appears to have entirely failed to comprehend our contention, as is shown by the following statement:[2]

> "There is nothing in the history of the collective bargaining between the Company and its employees which, in our judgment, would, as a matter of law, preclude the Board from determining that the production and maintenance employees at the six flat glass plants were an appropriate bargaining unit" (R. 550).

The Board found affirmatively that the history of collective bargaining was one of the controlling factors in its determination of the issue. The question, therefore, was whether that finding was supported by substantial evidence.

2. The Purported Findings That the Crystal City Union Was Company Dominated and That the Crystal City Employees Were Not Free to Express Their Desires as to the Appropriate Unit Are Without Support.

Throughout the Decision and Certification (R. 43-56) and

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[2] N. L. R. B. v. Pittsburgh Plate Glass Co., 113 Fed. (2d) 698, 702.

Decision and Order (R. 430-452) the Board finds, and emphasizes by repetition, that the Crystal City Glass Workers Union is Company dominated and that the expression of the overwhelming majority of the employees at Crystal City for a separate unit cannot be taken as a free expression on their part. The Board makes it clear that its belief that the employees at Crystal City are under the Company's control is one of the important factors which led it to the conclusion reached.

These findings are apparently all based upon proceedings had in a prior case arising out of a complaint against the Company charging various unfair labor practices at the Crystal City plant. The case was disposed of by stipulation, which was approved in an order made by the Board (Ex. P-1, R. 343-352; Introduced R. 32). There was no evidence taken in that case and the entire record consisted of the charge, amended charge, complaint, notice of hearing, respondent's answer, stipulation and the Board's order.

The only findings of fact made in that case concerned the interstate character of the Company's business and the nature of the labor organizations referred to therein.

The specific portions of the stipulation upon which the Board relies to support its findings are as follows:

> "The Respondent, its officers, agents, successors and assigns will forthwith cease and desist from such unfair labor practices as have occurred in the past" (R. 347).
>
> "3. The Respondent, its officers, agents, successors and assigns, will forthwith take the following affirmative action to effectuate the policies of the Act:
>
> "(a) Withdraw all recognition from the Crystal City Glass Workers' Union as the representative of the Respondent's employees, or any of them, as a labor or-

ganization, and notify said organization to that effect" (R. 348).

It is to be observed that there is no admission that the Company has in fact been guilty of unfair labor practices and certainly there is no admission that the Company has ever dominated, coerced, or interfered with the employees or any organization at Crystal City. The fact that the Federation, in its complaint, asserted that the Company had been guilty of such practices, and that the Board issued a complaint based thereon, is no evidence of the truth of the facts alleged. Nor does the mere fact that the Company compromised and settled the dispute occasioned thereby justify the inference that the Company was guilty. It is the policy of the law to encourage the amicable disposition of controversies by refusing to recognize such an inference.[3]

At any rate, the factual background, when considered in connection with the wording of the stipulation, shows that the latter was designed solely for the purpose of maintaining the status quo at Crystal City until the employees there could decide for themselves what, if any, labor union they desired to join. The Federation had only begun its efforts to organize Crystal City in December, 1937 (R. 172). Mr. Fuller, President of the Federation, requested the Company, in April, 1938, to discontinue negotiations with the Crystal City Union and assured the Company that if that were done he would not come around for an agreement covering Crystal City until his union had a majority there (R. 107). Since the Federation had had little opportunity to present its case to the workers at Crystal City, it was quite natural for the Company to escape the burden of a protracted and expensive hearing when, by stipulating to withdraw recognition from the

[3] Republic Fire Insurance Co. v. Weides, 81 U. S. 375, 14 Wall. 375, 20 L. Ed. 894 (1871).

Crystal City union, it could leave the field of contest to the contending labor organizations.

Since the Crystal City Union was not a party to those proceedings and did not join in the stipulation, the order therein was no adjudication against it,[1] and if it maintained its majority at Crystal City, and took appropriate steps, it could undoubtedly obtain a hearing by the Board on whether or not it was in fact a bona fide labor organization, entitled to recognition under the provisions of the Act. The stipulation was, of course, binding on the Company until the further order of the Board.

Where, upon a basis of evidence, a union is found to be disqualified from acting as a labor organization, it is the practice of the Board to use the word "disestablished." No such terminology is used in the stipulation or order in question. It was not intended that any such adjudication should be made.

Under these circumstances, it seems perfectly obvious that the purpose of the stipulation was to maintain the status quo, so far as the Company was concerned, while the Crystal City Union and the Federation were respectively striving to establish the right to represent the employees at the Crystal City plant.

The Court of Appeals misstated the facts in saying:[2]

> "This was the situation when the Federation initiated, through the National Labor Relations Board, a proceeding which resulted in a determination by the

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1 N. L. R. B. v. Pacific Greyhound Lines, Inc., 303 U. S. 272, 58 S. Ct. 577, 82 L. Ed. 838 (1938).
National Licorice Co. v. N. L. R. B., 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940).
The statement of the Board that its order in Case C-778, where the Crystal City union was not a party, adjudicates the rights of that union and disables it from presenting evidence in these proceedings to show that it is a bona fide labor organization, goes further than the opinions of this Court justify.

2 Pittsburgh Plate Glass Co. v. N. L. R. B., 113 Fed. (2d) 698, 700.

Board that the Company should withdraw its recognition of the Crystal City Glass Workers' Union as the representative of its employees at Crystal City, on the ground that the union was Company-dominated and supported; * * *" (R. 547).

Neither the order nor the stipulation in Case C-778 required the Company to withdraw recognition from the Crystal City union because it was Company dominated and supported (R. 343-352). The Board did not find in that order that any such reason existed and it could not, in fact, have done so because neither the stipulation nor anything else in that record would have supported it.

B. The Board Has Based Its Decisions Upon Factors Which Have No Proper Bearing Upon the Case.

The Board says that each of the factors hereinafter specified were considered in reaching its decision, and that they support the order made. Whether, under the provisions of the particular legislation, such factors may be considered as bearing upon the issue, is a legal question.

1. The Assumption That the Desires of the Crystal City Employees Will Change.

Among the factors to which weight was given improperly, one is stated by the Board as follows:

"* * * Moreover, the prior existence of the Crystal City Union for over 3 years, until almost the day of the hearing in this proceedings, to a large degree explains the desire of the 1,300 Crystal City employees for a separate bargaining unit, as expressed in their petition, and such desires may well undergo a radical change as the effect of the termination of the Crystal City Union's function as a labor organization is fully realized by those employees" (R. 51).

The wishes of the employees for a separate unit are entitled to great weight, but the mere surmise or prediction as to what those wishes will be in the future may not properly be considered. The issue must be determined by facts, not by what the Board believes will be the fact at some unspecified future time.

The above declaration of the Board seems to be coupled, by implication, with the Board's erroneous belief that there is evidence of interference and domination at Crystal City.

There is no claim that the Company has not faithfully performed the stipulation, executed July 22, 1938, to withdraw recognition from and not to deal with the Crystal City union as a labor organization (R. 345-349).

2. The Opinion of the Board That the Crystal City Employees Would Benefit by the Experience of Employees in Other Plants in Collective Bargaining.

The Board says that the inexperience of the Crystal City workers in collective bargaining is a good reason for grouping them with those in other plants more experienced in this field (R. 52). This appears to be an appropriate argument for an organizer of the Federation to advance to employees at Crystal City. However, it is not a part of the Board's function, any more than it is the Company's, to determine what labor organization, if any, men should belong to.

3. The Fact That the Crystal City Employees Did Not Join in a Strike.

The fact that the employees at Crystal City did not join in the 1935-1936 strike was advanced by the Board as a reason for including them in a unit with the other plants (R. 51-52 and 443). It is doubted that Congress intended

that the power to ascertain and fix units be used to aid a particular union or to make it more formidable in a strike.

However that may be, the implications are not sound. Placing the Crystal City employees in the larger unit would not, of itself, cause those employees to join a strike called in other plants. If the Board means that, by imposing the multi-plant unit, it will force the employees to join the Federation or be deprived of any representative, then it is clearly exceeding its power. There is no right given to use the unit-fixing power to force employees into a union not selected by them. The Board is authorized to protect the right to "self-organization" and to foster collective bargaining—not to compel membership in a particular union so that it will be more effective in strikes or for any other reason.

There is no showing that the strike in 1935 was so meritorious as to make it reprehensible for the employees at Crystal City to refuse to join it. Any employee has a perfect right to strike or not as his own judgment and conscience dictates.

III.

For the Court to Assume That the Board Would Reach the Same Conclusion as to the Appropriate Unit, if Findings and Factors Illegally Considered Are Eliminated, Is Contrary to the Principle That the Judgment of the Court May Not Be Substituted for That of the Board on a Purely Administrative Question.

The Court of Appeals reaffirmed an indisputable principle in these words:[1]

> "• • • The determination of certain matters was, under the National Labor Relations Act, entrusted by Congress to the National Labor Relations Board alone,

[1] 113 F. (2d) 698, 701 (1940).

and the courts were denied power to substitute their judgments with respect to such matters for those of the Board" (R. 548).

It failed, however, in the application of the principle.

Where the Board has reached a conclusion manifestly based, in part at least, upon errors of law as to findings or rulings, the Court must return the case to the Board so that it may express the Board's judgment within the limits of its legal sphere of action as pointed out by the Court.

The Court, having ruled on questions of law, has exhausted its jurisdiction. It has no power to go further and decide the administrative problem nor may the Court make any assumption as to how the Board will act when it has eliminated errors previously committed.[2]

IV.

The Designation of the Appropriate Unit in This Case Is Not Supported by Evidence.

The lower Court concluded that the question of appropriate unit in this case is debatable. There can be no doubt but that the question of appropriate unit is one about which reasonable men may sharply differ according to their political and economic convictions. Such differences may properly be recognized, however, only when they are differences based upon the standards established by the Act itself.

The Board is directed by Congress to decide upon a unit which will insure to employees the full benefit of their

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2 National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, 226, 60 S. Ct. 493, 503-504, 84 L. Ed. 704 (1940); National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 342-343, 60 S. Ct. 918, 930-931, 84 L. Ed. 1226 (1940); National Labor Relations Board v. Falk Corporation, 308 U. S. 453, 458-9, 60 S. Ct. 307, 310, 84 L. Ed. 396 (1940).

right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.[2]

But "self-organization" of the Crystal City workers and their right to have "representatives of their own choosing" will not be furthered by ignoring the wishes of such employees; casting them in with employees at other plants, hundreds of miles away; and forcing them to accept as their exclusive representative a union which they did not select and which they do not desire, a union whose members are so far distant that they have no community of interest with the employees at Crystal City. Such a process does not establish industrial peace by permitting employees to exchange views on a basis of common understanding, to organize themselves, or to select their own representatives for collective bargaining. The obvious effect will be dissatisfaction and the likely result, industrial strife.

Both the Board and the Court of Appeals dispose of this frustration of the purposes of the Act by stating that such a situation is common with minorities. The Court of Appeals expresses this view as follows:

> "It seems unfortunate that the employees at the Crystal City plant should be forced to accept a representative, for collective bargaining, not of their own choosing but that situation is not an uncommon one with minorities" (R. 549, 550).

The problem cannot be disposed of, however, by saying that existence of minorities is the normal result of democratic rule. That begs the question. It becomes true only when the unit which has existed at Crystal City since 1870 (R. 88) is validly destroyed by merger into a larger unit.

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2 29 U. S. C. A., Sec. 159.

One of the features of majority rule is that a minority shall be heard; that it have an opportunity to persuade the majority to another view. Obviously the unit here denies such opportunity.

The Crystal City plant is a separate industrial unit, managed and operated locally, and is independent to such an extent that it could be operated for the production of plate, duplate, and herculite glass, even if it were the only plant the Company had (R. 95). The Superintendent at Crystal City is in full charge of the operations there (R. 89 et seq.); all matters of working conditions (R. 89), employment and grievances (R. 92) are handled locally by him. Any change in wage rates at Crystal City are originally determined by the local Superintendent (R. 112, 235). All the buying for that plant is done locally and it is the only plant of the Company which has a local purchasing agent (R. 111). The only Pilkington type tank which is owned by the Company is operated at Crystal City (R. 90, 98). The only sand mine in the Company's system is operated at Crystal City (R. 88).

No material fabricated at Crystal City is shipped to other plants for further work and in normal operations it does not receive any finished or partly finished material from other plants (R. 88-89). There is no exchange of employees between Crystal City and the other plants (R. 89, 244). The geographic location of the Company has had substantial influence on the large degree of local control of Crystal City operations. The nearest plant producing similar products is 675 miles away (R. 90) and the location of the Home Office at Pittsburgh, Pennsylvania, is inconsistent with centralized management of the operating detail of the plant in question.

The lower Court recognized that it could be designated as appropriate:[3]

[3] 113 F. (2d) 698, 701 (1940).

"* * * The Board, under the facts and circumstances disclosed by the evidence, properly might have determined that the employees at the Crystal City plant were a homogeneous group whose wishes as to representation for the purposes of collective bargaining should be respected and who constituted an appropriate unit for collective bargaining; but we think that it was not compelled to do so" (R. 548).

The Board's contentions are, we believe, consistent with the view that the Crystal City plant could have been found to be the appropriate unit.

The Act by Sec. 9 a[1] gives the absolute right to employees in "a unit" appropriate for the purposes of collective bargaining to have representatives chosen by a majority. Section 7 guarantees the right to bargain "through representatives of their own choosing."

Sec. 9 b[1] merely provides the machinery for ascertaining whether the claimed unit is one and whether it is appropriate. It is not designed to limit the rights granted by Sec. 9 a and Sec. 7. Its very purpose is to preserve those rights.

We again adopt a statement from the dissenting opinion of Mr. Leiserson:

> "I do not think the Board is vested with authority by the Act to extend to employees in unorganized plants the representatives chosen by organized workers in other plants. The Board's authority is limited to restraining interference or domination by the employer and to providing the employees an opportunity to express a free choice as to the representation they desire. Even if the employer misbehaved, that does not justify the Board in taking away from his employees the right guaranteed by the Act to have a representative of their own choosing" (R. 450).

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1 29 U. S. C. A., Sec. 159a, b.

> "* * * What the Federation could not itself secure by collective bargaining when the contract was negotiated is given to it by the Board in a finding as to the appropriate bargaining unit" (R. 451).

The Board has, in other cases, recognized the above principle. It has consistently held that where the considerations are evenly balanced (that is to say, where either of two units is appropriate) the determining factor is the desire of those affected.[2] Here all of the other plants are already represented by the Federation and, consequently, the only employees affected by the order are those at Crystal City.

V.

The Refusal of the Board to Consider the Wishes of the Great Majority of the Employees at Crystal City for Specious Reasons Is Arbitrary and Invalidates the Order.

The reasons advanced by the Board to distinguish this case from its rulings in the cases cited and as grounds for refusing to consider the demand of most of the employees at Crystal City for a separate unit are (1) that the desire of the employees at Crystal City may undergo a change; (2) that the employees in that plant are inexperienced in collective bargaining; (3) that the stipulation and order in Case C-778 shows that the employees there are not free to express their true wishes (R. 51 and 439). These reasons, as we have shown under Point II, A and B, of this brief, are specious.

It is no compliance with the legal requirements applicable to proceedings before administrative bodies for the

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2 Compare: Allied Lab., Inc., 22 N. L. R. B. No. 14 (1940); Globe Machine & Stamping Co., 3 N. L. R. B. 294 (1937); Atlantic Refining Co., 1 N. L. R. B. 359 (1936); Report of N. L. R. B. to Senate Committee on Education and Labor, April, 1939, Part II, p. 147; Second Annual Report N. L. R. B., June 30, 1937, p. 127; Third Annual Report N. L. R. B., p. 171.

Board to say that it has considered the wishes of the employees at Crystal City and has rejected that factor for assigned reasons, when it appears that the reasons given are not legally supportable. The Board is required to give reasonable consideration to an element of such importance as the one we are now discussing. To reject it for illegal reasons is the equivalent of refusing to consider it.

Refusal to consider this factor of the desires of the employees, which is admittedly of first magnitude on the issue, is arbitrary and amounts to an error of law.

A. The Exclusion of Evidence.

An offer of proof made by petitioner at the hearing was excluded (R. 26-31). The Board sets out, at page 439 of the record, the substance of the offer and its ruling sustaining the Trial Examiner:

> "(1) that at the time of the hearing 1,500 of the 1,800 employees at the Crystal City plant belonged to the Crystal City Union and had designated it as their representative for the purposes of collective bargaining, and that the Crystal City Union members were opposed to being represented by the Federation for the purposes of collective bargaining; (2) that since the stipulation of July 22, 1938, was entered into by the Board, the respondent, and the Federation, and since the Board's Decision of January 13, 1939, the Crystal City Union's membership had increased; and (3) that the Crystal City Union had bargained collectively with the respondent for its members until the respondent refused to continue such bargaining because of the charges filed against the respondent by the Federation in the proceedings resulting in the Board's Order and Decision of September 22, 1938. Accepting the foregoing offer of proof as correctly stating the facts, nevertheless, in view of the proceedings against the respondent culminating in the

court decree of January 14, 1939, negotiations between the respondent and the Crystal City Union cannot be regarded by the Board as evidence of genuine collective bargaining; nor can the Crystal City Union's membership and representation of employees at the Crystal City plant be considered by the Board as expressing the free choice of the employees at that plant or as establishing the existence of another labor organization, in addition to the Federation, capable of bargaining collectively with the respondent for the employees there. In so far as this evidence can be assumed to show opposition among the Crystal City plant employees to the Federation, the Board's Decision of January 13, 1939, considered such arguments by the respondent and the Crystal City Union. We see no reason to alter our determination there set forth."

In accordance with Sections 10 (e) and (f) of the Act[3] and the decision in Consolidated Edison Company v. N. L. R. B.,[4] petitioner filed its petition to adduce the abovementioned evidence (R. 536, 540). This petition was denied by the lower court (R. 552-553).

Petitioner should have been permitted to make this showing, and the rulings to the contrary were erroneous.

The extent of this error is illustrated by the fact that the Board's order is expressly based upon findings of fact which this evidence would have directly disputed in the following particulars:

(1) The Board stated (erroneously, as we have already pointed out) that the membership of the Crystal City union has been dominated by the Company (R. 439, 443). There was no basis for this statement, and the offered evidence would have so demonstrated.

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3 29 U. S. C. A., Sec. 160.

4 305 U. S. 197, 226, 59 S. Ct. 206, 215, 83 L. Ed. 126 (1938).

(2) The Board made the assumption that the wishes of the Crystal City employees might change when they became aware of the fact that the Crystal City union could not represent them as a labor organization (R. 51). The evidence would have shown that this improper surmise was contrary to the existing facts.

(3) The Board found that the employees at Crystal City had never made any effort to bargain collectively with the Company separately from the other plants (R. 50). Uncontradicted evidence in the record to the contrary would have been corroborated by the testimony offered.

The reasons given by the Board do not justify the above ruling. Even though the Company was bound by its stipulation and the order based thereon not to deal with the Crystal City union as a labor organization, that organization had a right to exist for such other functions as it cared to exercise. It was not a party to the proceedings in which the stipulation was filed. Although this Court has ruled that such fact does not prevent an order being made against the Company to refrain from dealing with the union, that principle does not justify treating such ruling as an adjudication of the rights of the Crystal City Union itself. It had a perfect right to show that it was in fact a bona fide labor organization. Furthermore, whether it could ever function as a labor organization does not affect the rights of its members to have a preference as to appropriate unit and to have such preference shown.

The compelling reason, however, for admitting the evidence is that the Board continually found and asserted that the stipulation "was evidence of Company domination." Petitioner offered to prove the true facts as to this matter, and it was highly improper and arbitrary for the Board to refuse to receive the testimony.

The Board said that even if the facts stated in the offers of proof are accepted as true, they would not alter the determination of the appropriate unit (R. 439). If the Board had considered the facts contained in the offer as true, it could not have made findings contrary thereto. There is no other evidence in the record on the subject.

In the portion of the Board's opinion which we have quoted, the Board says that it has already passed upon the effect of the wishes of the employees at the Crystal City plant. The Court of Appeals seems to have believed that the Board did consider this fact. We have shown, supra, that the Board refused, in effect, to give any consideration to this important element and that its action was based upon findings which were unsupported and specious.

VI.

If the National Labor Relations Act Contains Sufficient Standards to Comply With Sec. 1, Art. I, of the Constitution of the United States, Such Standards Have Not Been Objectively Applied to the Facts in This Case and the Action of the Board Has Been Arbitrary and Discriminatory, So That Petitioner Has Been Denied Due Process of Law, in Violation of the Fifth Amendment to the Constitution of the United States.

Petitioner has urged throughout that Sec. 9[1] does not contain sufficient standards to validate the delegation of legislative authority. The point is now urged before this Court. The Court has not heretofore specifically discussed the point. Counsel is obliged to say, however, that inferences from opinions in decided cases on the subject may indicate that the section referred to is regarded as constitutional.[2] A specific ruling upon the point is requested.

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1 29 U. S. C. A., Sec. 159.

2 N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937); N. L. R. B. v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 57 S. Ct. 645, 81 L. Ed. 893 (1937).

Assuming that the standards are sufficient, it must be admitted that they are barely so and that the amount of discretion lodged in the Board is great. This, we respectfully submit, imposes a duty upon courts to ascertain with particular care whether the standards have in fact been impartially and fairly applied. In discussing this duty Mr. Justice Cardozo said, in his dissenting opinion in Panama Refining Co. v. Ryan.[3]

> "I am not unmindful of the argument that the President has the privilege of choice between one standard and another, acting or failing to act according to an estimate of values that is individual and personal. To describe his conduct thus is to ignore the essence of his function. What he does is to inquire into the industrial facts as they exist from time to time (citing cases). **These being ascertained, he is not to prefer one standard to another in any subjective attitude of mind, in any personal or willful way. He is to study the facts objectively, the violation of a standard impelling him to action or inaction according to its observed effect upon industrial recovery,**— the ultimate end, as appears by the very heading of the title, to which all the other ends are tributary and mediate." (Emphasis ours.)

When the Board's findings and declarations are measured by the record it becomes apparent that the Board has gone beyond permissible limits in this case. Specious arguments and reasons have been given. Important testimony has been ignored, belittled and, in some instances, excluded entirely. Factors which must be considered have been cast aside. The aggregate of these actions demonstrates that the majority of the Board was, subconsciously at least, actuated by a fixed purpose to reach a particular result and that it carried out such determination in spite of standards, evidence, and reason.

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[3] 293 U. S. 388, 437-438, 55 S. Ct. 241, 255-256, 79 L. Ed. 446 (1935).

Although it must be recognized that the Board cannot be hampered by insistence that its opinions in various cases be meticulously consistent, nevertheless, when the Board's rulings in other cases, involving the same issue and containing impressively similar facts, are directly contrary to its conclusions here, some corroboration is found for our assertion that the action taken in this case is arbitrary and capricious.

For example, in the Ohio Foundry Company case[4] the Board said that the fact that one plant refused to join with others in a strike shows "isolation" and tends to justify a separate unit. Here the same fact is held to support an inclusive unit.

In Allied Chemical Co.[5] (decided since the order in this case) the Board concluded from evidence like that with which we are here confronted that either a separate or multiple plant unit is appropriate and that wishes of the employees must control.

The Model Blouse Company case[6] is distinguished on the alleged ground of difference in history of collective bargaining—a difference which does not exist.

In the Chrysler Company and Briggs Company cases[7] the history of collective bargaining is said to support separate units for each plant when, in fact, past labor contracts are the same as Exs. P. 1, 2 and 3 (R. 275, 282, 290; Introduced, R. 106), from which the Board reaches the opposite result here.

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4 3 N. L. R. B. 701 (1937).

5 23 N. L. R. B. No. 14 (1940).

6 15 N. L. R. B. No. 19 (1939); see also Belmont Iron Works, 9 N. L. R. B. 1202 (1938).

7 Chrysler Corp., 13 N. L. R. B. No. 121 (1939); Briggs Mfg. Co., 13 N. L. R. B. No. 123 (1939).

CONCLUSION.

A complete analysis of this case would cause the brief to be unduly long. It is believed, however, that sufficient instances have been called to the Court's attention to disclose the improper attitude of the Board in this case and to illustrate the errors in its decision.

For the reasons stated herein, it is respectfully urged that the decree of the lower court be reversed and the case remanded for further proceedings in accordance with such declarations as this Court may make.

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